

Public-Private Partnerships



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*The
National Council
for
Public-Private Partnerships*

HOW PARTNERSHIPS WORK

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PUBLIC-PRIVATE PARTNERSHIPS DEFINED

A Public-Private Partnership is a contractual agreement between a public agency (federal, state or local) and a private sector entity. Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public. In addition to the sharing of resources, each party shares in the risks and rewards potential in the delivery of the service and/or facility.

KEYS TO SUCCESSFUL PUBLIC-PRIVATE PARTNERSHIPS

There are six critical components of any successful Public-Private Partnership (PPP). While there is not a set formula or an absolute foolproof technique in crafting a successful PPP, each of these keys is involved in varying degrees.

POLITICAL LEADERSHIP:

A successful partnership can result only if there is commitment from "the top". The most senior public officials must be willing to be actively involved in supporting the concept of PPPs and taking a leadership role in the development of each given partnership. A well-informed political leader can play a critical role in minimizing misperceptions about the value to the public of an effectively developed partnership. Equally important, there should be a statutory foundation for the implementation of each partnership.

PUBLIC SECTOR INVOLVEMENT:

Once a partnership has been established, the public-sector must remain actively involved in the project or program. On-going monitoring of the performance of the partnership is important in assuring its success. This monitoring should be done on a daily, weekly, monthly or quarterly basis for different aspects of each partnership (the frequency is often defined in the business plan and/or contract).

A WELL THOUGHT-OUT PLAN:

You must know what you expect of the partnership beforehand. A carefully developed plan (often done with the assistance of an outside expert in this field) will substantially increase the probability of success of the partnership. This plan most often will take the form of an extensive, detailed contract, clearly describing the responsibilities of both the public and private partners. In addition to attempting to foresee areas of respective responsibilities, a good plan or contract will include a clearly defined method of dispute resolution (because not all contingencies can be foreseen).

A DEDICATED INCOME STREAM:

While the private partner may provide the initial funding for capital improvements, there must be a means of repayment of this investment over the long term of the partnership. The income stream can be generated by a variety and combination of sources (fees, tolls, shadow tolls, tax increment financing, or a wide range of additional options), but must be assured for the length of the partnership.

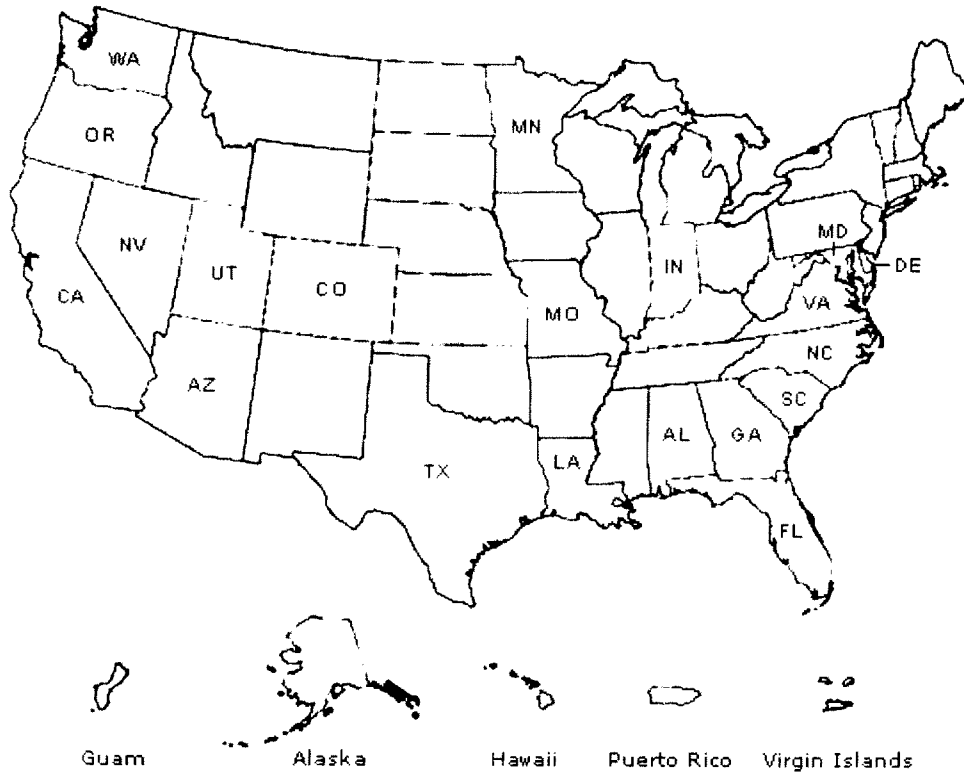
COMMUNICATIONS WITH STAKEHOLDERS:

More people will be affected by a partnership than just the public officials and the private-sector partner. Affected employees, the portions of the public receiving the service, the press, appropriate labor unions and relevant interest groups will all have opinions, and frequently significant misconceptions about a partnership and its value to all the public. It is important to communicate openly and candidly with these stakeholders to minimize potential resistance to establishing a partnership.

SELECTING THE RIGHT PARTNER:

The "lowest bid" is not always the best choice for selecting a partner. The "best value" in a partner is critical in a long-term relationship that is central to a successful partnership. A candidate's experience in the specific area of partnerships being considered is an important factor in identifying the right partner. The listing of NCPMP members (provided under Council Members on this site) provides a logical starting point for the identification of potential partners or services that might be required in the development of a partnership.

States with Significant Transportation PPP Authority



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This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

This model legislation is based on a survey of existing State statutes that authorize public-private initiatives. The purpose of this model PPP legislation is to provide States with an example of what basic elements to consider and address in PPP authorizing legislation. It is meant to serve as a representation of the core provisions dealing with issues that a State should consider when pursuing greater private sector involvement in the delivery of transportation services. Users are advised that the model legislation cannot anticipate the relationship of State laws with the model provisions contained herein. This model legislation has been prepared solely for informational purposes and should be not construed as a statement of United States Department of Transportation or Federal Highway Administration policy.

AN ACT

concerning Public-Private Transportation Initiatives

Be it enacted by the [State Legislature] that:

SECTION 1. [State Code Citation] is amended to read:

§1-101. Definitions.

(a) “Affected jurisdiction” means any county [, city, or town / or municipal corporation], or other unit of government within the State in which all or part of a transportation facility is located or any other public entity directly affected by the transportation facility.

(b) “Department” means the State Department of Transportation.

(c) “Force majeure” means an uncontrollable force or natural disaster not within the power of the operator or the State.

(d) “Maintenance” includes ordinary maintenance, repair, rehabilitation, capital maintenance, maintenance replacement, and any other categories of maintenance that may be designated by the Department.

(e) “Material default” means any failure of an operator to perform any duties under a public-private agreement, which jeopardizes delivery of adequate service to the public and remains unsatisfied after a reasonable period of time and after the operator has received written notice from the Department of the failure.

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(f) "Operate" means any action to maintain, rehabilitate, improve, equip, or modify a transportation facility.

(g) "Operator" means a private entity that has entered into a public-private agreement under this [title/chapter/article].

(h) "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other business entity.

(i) "Public-private agreement" means the agreement between a private entity and the Department that relates to the development, financing, maintenance, or operation of a transportation facility subject to this [title/chapter/article].

(j) "Public-private initiative" means an arrangement between the Department and one or more private entities, the terms of which are stated in a public-private agreement, that provides for:

(1) acceptance of a private contribution, including a money payment, for a project or service for a transportation facility;

(2) sharing of resources and the means of providing a project or service for a transportation facility;

(3) cooperation in researching, developing, and implementing projects or services for a transportation facility.

(k) "Transportation facility" means any, including new and existing, highway, road, bridge, tunnel, overpass, ferry, airport, public transportation facility, vehicle parking facility, seaport facility, rail facility, intermodal facility, or similar facility open to the public and used for the transportation of persons or goods, and any building, structure, parking area, appurtenances, or other property needed to operate such facility that is subject to a public-private agreement.

(l) "User fees" means the rate, toll, fee, or other charges imposed by an operator for use of all or part of a transportation facility.

(m) "Utility" means a privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including fire or police signal system or street lighting system, which directly or indirectly serves the public.

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§1-102. Solicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to solicited proposals under this [title/chapter/article].

(b) The Department may solicit, receive, consider, evaluate, and accept a proposal for a public-private initiative.

(c) In soliciting and selecting a private entity with which to enter into a public-private initiative, the Department may utilize one or more of the following procurement approaches:

(1) sealed bidding;

(2) selection of proposals, with or without negotiations, based on qualifications, best value, or both; or

(3) any competitive selection process that the Department determines to be appropriate or reasonable.

(d) The Department may consider the following factors in evaluating and selecting a bid or proposal to enter into a public-private initiative:

(1) the ability of the transportation facility to improve safety, reduce congestion, increase capacity, and promote economic growth;

(2) the proposed cost of and financial plan for the transportation facility;

(3) the general reputation, qualifications, industry experience, and financial capacity of the private entity;

(4) the proposed design, operation, and feasibility of the transportation facility;

(5) comments from local citizens and affected jurisdictions;

(6) benefits to the public;

(7) the safety record of the private entity; and

(8) other criteria that the Department deems appropriate.

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(e) The Department may select multiple private entities with which to enter a public-private agreement for a transportation facility if it is in the public interest to do so.

(f) The Department shall select a private entity or entities for a public-private initiative on a competitive basis to the maximum extent practicable.

Version #1

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of a solicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of a solicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(g) (1) A private entity may request a review, prior to submission of a solicited proposal, by the Department of information that the private entity has identified a

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confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of a solicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

§1-103. Unsolicited Proposals.

(a) The [INSERT STATE'S PROCUREMENT ACT] shall not apply to this section.

(b) (1) The Department may receive, consider, evaluate, and accept an unsolicited proposal for a public-private initiative if the proposal:

(A) is independently originated and developed by the proposer;

(B) benefits the public;

(C) is prepared without Department supervision; and

(D) includes sufficient detail and information for the Department to evaluate the proposal in an objective and timely manner.

(2) Within [INSERT NUMBER] days after receiving an unsolicited proposal, the Department shall undertake a preliminary evaluation of the unsolicited proposal to determine if the proposal complies with the requirements under paragraph (1) of this subsection.

Version #1

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified as confidential or proprietary to determine whether such information would be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) A private entity may identify confidential or proprietary information submitted as part of an unsolicited proposal. A private entity shall have an opportunity to object to the release of any information it identifies as confidential or proprietary.

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(3) The Department shall review any information identified as confidential or proprietary by a private entity as part of an unsolicited proposal and shall determine if such information is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(4) The Department shall inform the private entity that submitted the information of its determination of whether information identified by the private entity as confidential or proprietary is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(5) The private entity shall have the opportunity to object to the determination that the information is subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT] or to withdraw its proposal.

(6) Any information determined by the State to be confidential or proprietary shall be exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(7) Any information not determined to be confidential or proprietary may be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

Version #2

(c) (1) A private entity may request a review, prior to submission of an unsolicited proposal, by the Department of information that the private entity has identified a confidential or proprietary to determine whether such information will be subject to disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(2) The Department shall take appropriate action to protect confidential or proprietary information that a private entity provides as part of an unsolicited proposal and that is exempt from disclosure under [INSERT CITATION TO STATE FREEDOM OF INFORMATION ACT OR OPEN RECORDS ACT].

(d) (1) If the unsolicited proposal does not comply with the subsection (b)(1) of this section, the Department shall return the proposal without further action.

(2) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department may continue to evaluate the proposal in accordance with this section.

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(e) (1) If the unsolicited proposal complies with the subsection (b)(1) of this section, the Department shall advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same proposed transportation facility.

(2) The advertisement shall outline the general nature and scope of the unsolicited proposal, including the location of the transportation facility and the work to be performed on or in connection with the transportation facility and shall specify an address to which a competing proposal may be submitted.

(3) The advertisement shall specify a reasonable time period by which competitors must submit a competing proposal to the Department.

(f) The Department may charge a reasonable fee to cover its costs to process, review, and evaluate an unsolicited proposal and any competing proposals.

(g) The Department shall:

(1) determine if any competing proposal is comparable in nature and scope to the original unsolicited proposal;

(2) evaluate the original unsolicited proposal and any comparable competing proposal; and

(3) conduct any good faith discussions and, if necessary, any negotiations concerning each qualified proposal.

(h) The Department shall evaluate an unsolicited proposal and any comparable competing proposal using the following factors:

(1) novel methods, approaches, or concepts demonstrated by the proposal;

(2) scientific, technical, or socioeconomic merits of the proposal;

(3) potential contribution of the proposal to the Department's mission;

(4) capabilities, related experience, facilities, or techniques of the private entity or unique combinations of these qualities that are integral factors for achieving the proposal objectives;

(5) qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel, who are critical to achieving the proposal objectives;

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(6) how the proposal benefits the public; and

(7) any other factors appropriate to a particular proposal.

(i) After evaluating the unsolicited proposal and any competing proposals, the Department may:

(1) accept the unsolicited proposal and reject any competing proposals;

(2) reject the unsolicited proposal and accept a comparable competing proposal if the Department determines that the comparable competing proposal is the most advantageous to the State;

(3) accept both an unsolicited proposal and a competing proposal if accepting both proposals is advantageous to the State; or

(4) reject the unsolicited proposal and any competing proposals.

(j) Subsection (c) of this section shall apply to any unsolicited proposal or competing proposal that is rejected.

§1-104. Public-Private Agreement. Version #1

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) The public-private agreement shall provide for the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility.

(c) The financing mechanism included in a public-private agreement may include the imposition and collection of user fees and the development or use of other revenue sources.

(d) A public-private agreement between the Department and a private entity shall specify at least the following:

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- (1) which party will assume responsibility for which specific project elements and the timing of the assumption of responsibility;
- (2) the type of property interest, if any, the private entity will have in the transportation facility;
- (3) if and how the parties will share costs of development of the project;
- (4) if and how the parties will allocate financial responsibility for cost overruns;
- (5) liability for nonperformance;
- (6) any incentives for performance;
- (7) any accounting and auditing standards to be used to evaluate progress on the project; and
- (8) other terms and conditions.

§1-104. Public-Private Agreement. Version #2

(a) (1) After selecting a solicited or unsolicited proposal for a public-private initiative, the Department shall enter into a public-private agreement for a transportation facility with the selected private entity or any configuration of private entities.

(2) An affected jurisdiction may be a party to a public-private agreement entered into by the Department and a selected private entity or combination of private entities.

(b) A public-private agreement under this [title/chapter/article] shall provide for the following:

- (1) the planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing, or operation of a transportation facility;
- (2) the term of the public-private agreement;
- (3) the type of property interest, if any, the private entity will have in the transportation facility;

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(4) a description of the actions the Department may take to ensure proper maintenance of the transportation facility;

(5) whether user fees will be collected on the transportation facility and the basis by which such user fees shall be determined and modified;

(6) compliance with applicable Federal, State, and local laws;

(7) grounds for termination of the public-private agreement by the Department or operator; and

(8) procedures for amendment of the agreement.

(c) A public-private agreement under this [title/chapter/article] may provide for the following:

(1) review and approval by the Department of the operator's plans for the development and operation of the transportation facility;

(2) inspection by the Department of construction of or improvements to the transportation facility;

(3) maintenance by the operator of a policy of liability insurance or self-insurance;

(4) filing by the operator, on a periodic basis, of appropriate financial statements in a form acceptable to the Department;

(5) filing by the operator, on a periodic basis, of traffic reports in a form acceptable to the Department;

(6) financing obligations of the operator and the Department;

(7) apportionment of expenses between the operator and the Department;

(8) the rights and duties of the operator, the Department, and other State and local governmental entities with respect to use of the transportation facility;

(9) the rights and remedies available in the event of default or delay;

(10) the terms and conditions of indemnification of the operator by the Department;

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(11) assignment, subcontracting, or other delegation of responsibilities of the operator or the Department under the agreement to third parties, including other private entities and other State agencies;

(12) sale or lease to the operator of private property related to the transportation facility;

(13) traffic enforcement and other policing issues, subject to section 1-111, including any reimbursement by the private entity for such services; or

(14) other terms and conditions.

§1-105. Reversion of Transportation Facility to the Department.

In the event of termination of the public-private agreement, the authority and duties of the operator cease, except for any duties and obligations that extend beyond the termination as provided in the public-private agreement, and the transportation facility reverts to the Department and shall be dedicated to the Department for public use.

§1-106. Material Default; Remedies.

(a) Upon the occurrence and during the continuation of material default by an operator, not related to an event of force majeure, the Department may:

(1) elect to take over the transportation facility, including the succession of all right, title, and interest in the transportation facility, subject to any liens on revenues previously granted by the private entity; and

(2) terminate the public-private agreement and exercise any other rights and remedies that may be available.

(b) In the event that the Department elects to take over a transportation facility under subsection (a), the Department:

(1) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

(2) may develop and operate the transportation facility, impose user fees for the use of the transportation facility, and comply with any service contracts; and

(3) may solicit proposals for the maintenance and operation of the transportation facility under section 1-102 of this [title/chapter/article].

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§1-107. Bonds.

(a) (1) The Department may issue and sell bonds or notes of the Department for the purpose of providing funds to carry out the provisions of this [title/chapter/article] with respect to the development, financing, or operation of a transportation facility or the refunding of any bonds or notes, together with any costs associated with the transaction.

(2) Any bond or note issued under this section:

(A) constitutes the corporate obligation of the Department;

(B) does not constitute the indebtedness of the State within the meaning or application of any constitutional provision or limitation; and

(C) is payable solely as to both principal and interest from:

(i) the revenues from a lease to the Department, if any;

(ii) proceeds of bonds or notes, if any;

(iii) investment earnings on proceeds of bonds or notes; or

(iv) other funds available to the Department for such purpose.

(b) (1) For the purpose of financing a transportation facility, the Department and operator may apply for, obtain, issue, and use private activity bonds available under any Federal law or program.

(2) Any bonds debt, other securities, or other financing issued for the purpose of this [title/chapter/article] shall not be considered to be a debt of the State or any political subdivision of the State or a pledge of the faith and credit of the State or any political subdivision of the State.

(c) Nothing in this section shall limit a local government or any authority of the State to issue bonds for transportation projects.

§1-108. Funding from Federal Government or Other Sources.

(a) (1) The Department may accept from the United States or any of its agencies funds that are available to the State for carrying out this [title/chapter/article], whether the funds are made available by grant, loan, or other financial assistance.

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(2) The State assents to any Federal requirements, conditions, or terms of any Federal funding accepted by the Department under this section.

(3) The Department may enter into agreements or other arrangements with the United States or any of its agencies as may be necessary for carrying out the purposes of this [title/chapter/article].

(b) The Department may accept from any source any grant, donation, gift, or other form of conveyance of land, money, other real or personal property, or other item of value made to the State or the Department for carrying out the purpose of this [title/chapter/article].

(c) Any transportation facility may be financed in whole or in part by contribution of any funds or property made by any private entity or affected jurisdiction that is party to a public-private agreement under this [title/chapter/article].

(d) The Department may combine Federal, State, local, and private funds to finance a transportation facility under this [title/chapter/article].

§1-109. Property Tax Exemption.

(a) This section applies to:

(1) a transportation facility; and

(2) tangible personal property used exclusively with a transportation facility that are:

(A) owned by the Department and leased, licensed, financed, or otherwise conveyed to an operator; or

(B) acquired, constructed, or otherwise provided by an operator on behalf of the Department.

(b) Property listed under subsection (a) of this section are exempt from all ad valorem property taxes and special assessments levied against property by the State or any political subdivision of the State.

§1-110. Eminent Domain.

The Department may exercise the power of eminent domain to acquire property, rights of way or other rights in property for transportation projects that are part of a public-private initiative.

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§ 1-111. Police Powers; Violations of Law.

(a) All law enforcement officers of the State and of an affected local jurisdiction shall have the same powers and jurisdiction within the limits of the transportation facility as they have in their respective areas of jurisdiction and access to the transportation facility at any time for the purpose of exercising such powers and jurisdiction.

(b) The traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction shall be the same on the transportation facility as those laws applied to conduct on similar transportation facilities in the State or local jurisdiction.

(c) Punishment for violations of traffic and motor vehicle laws of the State or, if applicable, any affected local jurisdiction on the transportation facility shall be as prescribed by law for conduct occurring on similar transportation facilities in the State or local jurisdiction.

§1-112. Utility Crossings.

An operator under this [title/chapter/article] and any utility whose facility is to be crossed or relocated shall cooperate fully in planning and arranging the manner of the crossing or relocation of the utility facility.

§1-113. Sovereign Immunity.

Nothing in this [title/chapter/article] shall be construed or deemed to limit any waiver of the sovereign immunity of the State or any officer or employee of the State with respect to the participation in or approval of all or any part of the transportation facility or its operation.

§1-114. Regulations.

The Department may adopt rules and regulations to carry out the provisions of this [title/chapter/article].

SECTION 2. This Act shall take effect on [DATE].

PUBLIC INTEREST CONCERNS OF PUBLIC-PRIVATE PARTNERSHIPS

OVERVIEW

The United States national transportation system is designed to provide trade corridors for the movement of goods from coast to coast, fort-to-port connections for military personnel and materiel, long-distance recreational travel, local delivery (becoming more prominent due to rapidly rising e-commerce), and local and regional personal mobility.

During the second half of the 20th Century, the system has successfully met the diverse transportation needs of the national economy and the American people. Cornerstones of the national transportation system are strong federal leadership and a robust federal-state partnership. But the system is facing very serious challenges that stem from explosive traffic growth, increased international trade, changing demographics, evolving travel patterns, and insufficient funding.

Under the right circumstances and conditions, public-private partnerships ("PPPs") can lead to more efficient and effective construction, management, operation, and maintenance of transportation facilities. Where private financing is involved, PPPs can *supplement—but not provide a substitute for*—public investments in transportation improvements.

When a government agency considers contracting with a private company to renovate, construct, operate, maintain, manage, or finance a facility or system, there are many issues that must be examined.

Paramount among these responsibilities must be preserving the integrity of our integrated national surface transportation system and protecting the public interest.

SUMMARY OF RECOMMENDATIONS

ADVANCING PUBLIC OBJECTIVES

- States should regulate PPP toll facilities to provide private operators with a reasonable return on their investments while protecting the public from potential monopolistic price gouging, and ensuring that all needed maintenance will be provided throughout the life of the concession agreement.
- Revenues and proceeds generated from PPPs should be used only for projects to enhance transportation safety, capacity, and mobility, preferably within the corridors from which they are generated.
- States should not include “non-compete” clauses in PPP concession agreements that limit state and local governments’ ability to meet the current and future mobility and safety needs of the traveling public.
- To ensure the flexibility needed by future governments to meet changing conditions, PPP agreements should not extend beyond the design life of the facilities; they should be structured to be as short as possible.
- State transportation agencies, to the maximum practical extent, should develop and maintain independent, competent, in-house capabilities to negotiate with private-sector firms, to get the best value for the public in PPPs.
- States should ensure that PPP agreements do not result in environmental degradation, deny access to transportation by segments of our society, or otherwise undermine broadly supported social and public policy goals. Low-income drivers should be provided relief from high tolls charged for congestion pricing. The toll proceeds should be used to fund public transit and other highway alternatives for low-income individuals, in addition to maintenance of the facility and retirement of debt.

MAINTAINING THE INTEGRITY OF THE TRANSPORTATION PLANNING PROCESS

- States should enact enabling legislation that promotes timely distribution of relevant information to the public concerning proposed PPP projects and encourage open and full public participation throughout the review of the projects.
- States should enact enabling legislation that does not allow unsolicited PPP proposals, which do not go through the established planning process or open, competitive procurement. Private firms wishing to carry out projects under PPP arrangements should work with public authorities to develop projects consistent with the transportation improvement programs (TIPs, STIPs) and long-range plans.

PRESERVING AN INTEGRATED NATIONAL SURFACE TRANSPORTATION SYSTEM

- PPPs should be pursued with vigorous federal oversight and coordination to produce a robust regional and national transportation system.

PUBLIC INTEREST CONCERNS

I. ADVANCING PUBLIC OBJECTIVES

A. Public-Private Partnerships Should Protect the Public from Monopolistic Pricing

Recommendation: *PPP toll facilities should be regulated to provide private operators with a reasonable return on their investments while protecting the public from unreasonably high toll rates or excessive profits.*

Background:

Toll facilities under public-private partnerships, like water and electric utilities, are government-sanctioned monopolies. They should be regulated as such to protect the public against abuses of monopoly power resulting in excessive tolls. Tolls should be set at a level which limits the operator to a reasonable return on investment.

Concession agreements that provide automatic toll escalation may result in tolls much higher than needed to produce a reasonable return on investment.

States should consider establishing a pre-determined return on the investment as part of PPP concession agreements. This would allow early conclusion of the agreements and control of the facility to be returned to the state ahead of schedule after the set total return on investment is attained.

B. Public-Private Partnerships Should Enhance Transportation Safety, System Capacity, and Mobility

Recommendations: *Revenues and proceeds generated from PPPs should be used only for projects to enhance transportation safety, capacity, and mobility, preferably within the corridors from which they are generated.*

Non-compete clauses, broadly defined, which limit state and local governments' ability to meet the mobility and safety needs of the traveling public, should not be included in PPP concession agreements.

Background:

Enhancement of safety, capacity, and mobility should be the primary objectives of a government's transportation policy, and hence of the public-private partnerships. Revenues and proceeds derived from PPPs should be used by the states for transportation improvement projects only, preferably within the same corridors from which the revenues are generated.

"Non-compete" clauses in concession agreements limit the ability of the state to improve roads and meet economic development objectives.

The most recent versions of the "non-compete" clause allow the state to go forward with projects that are included in the 20-year plan when the concession agreement is signed, but require reimbursement of the toll road operator if the state undertakes projects not in the plan that impair toll revenues. States implementing needed transportation improvements in the vicinity of toll facilities under such concession agreements therefore could find themselves facing severe financial strains to reimburse the private operators for their lost revenues.

States should be cautious in agreeing to these arrangements as they may significantly limit a state's ability to respond to changing needs by revising its transportation plans.

C. Public-Private Partnerships Should Preserve Flexibility in Future Decision-making

Recommendation: *Terms of PPP agreements should not extend beyond the design life of the facilities; they should be structured to be as short as possible.*

Background:

Whether used to build new capacity (greenfield projects) or to turn existing public toll facilities into private operation (brownfield projects), public-private partnerships most often involve long-term concessions.

Recent leases of existing toll facilities in Illinois, Indiana, and Virginia involve concession agreements that run from 75 to 99 years. Recent concessions for new toll roads in California and Texas are for 45 and 50 years, respectively. Public control over these facilities with regard to operation, maintenance, and improvement has been ceded to the private firms for up to four generations.

Highways are important economic development tools for state and local governments. Extremely long leases of toll roads not only transfer control of the affected facilities to the private sector, they also limit, for generations to come, the ability of state and local governments to develop the wider regions through which the toll roads run. European experience shows that political leverage by public agencies over their private-sector partners in PPPs dissipates very rapidly, and is virtually exhausted about 10 years into a concession agreement.

Long-term concessions may provide substantial savings in public spending or upfront cash infusion, but this mortgaging scheme shifts the burden of paying for the facilities to future generations. Moreover, long term concessions severely limit the ability of future governments of states and localities to make rational decisions to adapt to changing circumstances.

D. Public-Private Partnerships Should Promote an Equitable Sharing of Risks and Rewards

Recommendation: *State transportation agencies, to the maximum practical extent, should develop and maintain independent, competent, in-house capabilities to negotiate with private-sector firms in order to get the best value for the public in public-private partnerships.*

Background:

When private firms participate in transportation investments, varying degrees of risks are shifted to those firms in exchange for an opportunity to earn financial rewards.

To ensure that the risks are shifted to the partner that can best handle them, and that the rewards earned are commensurate with the risks assumed, states need to develop independent, in-house capabilities to negotiate with, and oversee the operations of, private-sector firms.

Many project sponsors rely on outside advisors to provide assistance in their analysis and negotiations of proposed public-private partnerships. This may be a problem because of serious potential conflicts of interest. Wall Street analysts have posited the hypothetical example of a firm that is providing financial advice to a state involved in PPP negotiations while simultaneously engaging in investment banking for the same deal. With rapidly growing interest in PPPs in the United States among investment banking firms that also provide financial advice to the states, this hypothetical situation is quite real. In such a situation, there must be strong firewalls separating the financial advice from investment banking to prevent conflicts of interest.

Even firewalls may be inadequate, since the high financial stakes involved will create strong incentives to breach the firewalls.

Moreover, even advisors with no other line of business or no private-sector client may still fail to adequately represent a state in PPP negotiations. The advisor may not want to alienate private-sector firms, which may want to use the advisor in future PPP deals.

If outside advisors must be used, states should impose and enforce a code of ethics requiring the advisors to provide full disclosure of formal and informal business relationships with any potential bidders, enter into confidentiality agreements with the public agencies, and agree to a ban of meaningful duration from representing private-sector bidders.

E. Public-Private Partnerships Should Protect Workers, the Environment, Small Businesses, and Low-Income Drivers

Recommendation: In developing the terms of PPPs, state transportation agencies should ensure that the agreements do not result in environmental degradation, denial of opportunities or access to segments of our society, or otherwise undermine broadly supported social and public policy goals. Low-income drivers should be provided relief from high tolls charged for congestion pricing. The toll proceeds should be used to fund public transit and highway alternatives for low-income individuals.

Background:

Federal assistance for highway development is provided under the Federal-aid Highway Program that imposes requirements regarding prevailing wages (Davis-Bacon), assistance for small and minority-owned businesses (disadvantaged business enterprises), environmental review (NEPA), air quality improvement (clean air conformity), environmental mitigation (wetlands), resource conservation (4(f), endangered species), domestic job and industrial base protection (Buy America), and accommodation for the disabled (ADA). These requirements are intended to help achieve specific social and public policy goals that are widely accepted. States should not attempt to avoid these requirements by segmenting projects and funding selected portions with only non-federal funds.

Tolls charged for the use of a transportation facility under a public-private partnership arrangement are regressive; the higher the tolls—such as the high tolls that would be charged in congestion pricing—the greater the negative impact on low-income drivers. These impacts should be mitigated. Electronic toll collection makes it feasible to reduce or eliminate the tolls paid by low-income drivers.

Some low-income drivers may wish to switch to public transportation services because congestion pricing tolls are too high to be affordable. To accommodate these needs, states should use some portion of the toll proceeds to fund the public transit and highway alternatives for low-income individuals.

II. MAINTAINING THE INTEGRITY OF THE TRANSPORTATION PLANNING PROCESS

A. Public-Private Partnerships Should Preserve the Planning Process and Public Participation in Project Review

Recommendation: States should enact enabling legislation that promotes timely distribution of relevant information concerning proposed PPP projects to the public and encourages open and full public participation throughout the review of the projects.

Background:

Federal environmental and transportation law requires detailed transportation planning by the states and metropolitan planning organizations. The plan must be developed through a transparent public process that promotes full participation by all stakeholders. The final planning documents—the transportation improvement program (“TIP”), state transportation improvement program (“STIP”), and long-range transportation plan—are designed to reflect the collective views and vision of the community. Individual projects included in these documents must also undergo vigorous review.

Some states have enacted laws authorizing public-private partnerships that also limit the timely dissemination of information about the projects. Allowing PPP projects to avoid the full public review process will undercut the transparency and opportunity for public participation in the transportation planning and project review processes.

B. Public-Private Partnerships Should Reflect and Follow State and Local Transportation Priorities

Recommendation: *States should enact enabling legislation that does not permit unsolicited PPP proposals which may undercut or circumvent the planning process or distort open, competitive procurement. Private firms wishing to carry out projects under PPP arrangements should work with public authorities to develop projects consistent with the transportation improvement programs (TIPs, STIPs) and long-range plans.*

Background:

Some states have enacted, or are considering, laws to permit the submission of unsolicited proposals by private firms for transportation projects. These laws would require public transportation agencies to review the proposals within specified timeframes, and to go forward if the proposed projects are determined to be feasible.

The transportation planning process is designed to establish local and state transportation priorities, without regard to whether individual projects are financially profitable or not. Allowing unsolicited private proposals to bypass the transportation planning process seriously impairs the process. The result could be that the fiscally constrained projects that are included in the TIPs, STIPs, and long-range plans will have to be pushed back to make room at the front of the queue for the financially profitable privately proposed projects. This rearrangement of publicly-determined priorities undermines the established transportation planning process and, consequently, substantial taxpayer investment in transportation planning is squandered.

States must ensure that public-private partnerships do not undermine the planning process, which ensures that priority will be given to the public interest, not the desire of profits.

III. PRESERVING AN INTEGRATED NATIONAL SURFACE TRANSPORTATION SYSTEM

A. Public-Private Partnerships Should Help Advance the Goals of and Improve our National Transportation Program

Recommendation: *PPPs should be pursued with vigorous federal oversight and coordination in the context of a robust regional and national transportation program.*

Background:

Our national transportation system is under tremendous stress, and needs to be improved. A fragmented national system cannot deal effectively with the challenges it faces. Performance of the overall system will deteriorate over time. If left uncorrected, it could lead to system failure. Public-private partnerships can play a role in meeting the needs to enhance our transportation system. However, they must be implemented in a manner that does not reinforce and exacerbate the fragmentation of the national transportation system.

Many of the needed improvements include facilities in more than one state, and the development of projects which are located only in one area but benefit large regions or even the entire nation.

If states with very diverse social, economic, and other requirements act in complete independence of one another, they will produce an uncoordinated and inefficient transportation system that will not even serve each state's individual needs, because of contradictory or inconsistent actions taken by neighboring states.

These tendencies will be accentuated by PPPs if there is not strong oversight to ensure that these projects are developed as part of an overall plan for a national transportation system which also meets the needs of each state. Unless appropriate planning and public interest protections are incorporated into the procedures of implementing PPPs, these transactions could stimulate and accelerate the devolution of the federal program to the states.



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Ms. Miziolek has extensive experience in mergers and acquisitions of public and privately held companies in the automotive, building supply, and transportation industries, among others. She is the Co-chair of Dykema's Infrastructure and Project Finance Team with an emphasis on Public Private Partnerships. She has also counseled public clients in areas such as corporate governance and fiduciary duties.

Ms. Miziolek joined Dykema in 1982 and became a member in 1988. From 1980 to 1982 she clerked for the Honorable James P. Churchill of the U.S. District Court for the Eastern District of Michigan.

Ms. Miziolek has served as Chairperson and Council Member of the Business Law Section of the State Bar of Michigan. Ms. Miziolek was selected to *Crain's Detroit Business* 40 Under 40 list as one of the Southeast Michigan's best and brightest leaders under the age of 40. She has also served as an Adjunct Professor at Wayne State University Law School and frequently lectures on corporate and securities law issues for the Institute of Continuing Legal Education and other organizations.

Ms. Miziolek is a member of the Executive Board at Dykema and serves on the Board of Directors of The Citizens Research Council of Michigan and the Women's Caring Program. Ms. Miziolek is also listed in the 2007 edition of *Best Lawyers of America* and the *Chambers USA 2006 and 2007 America's Leading Lawyers for Business*.

Experience

- **Automotive Component Holdings, LLC**
Disposition of automotive facilities
- **Livonia Building Products**
Sale of entire group of affiliated companies
- **Ford Motor Company**
Acquisition of 23 Visteon Facilities
- **Ford Motor Credit Company**
Sale of Triad Financial Corporation
- **Parking Company of America Airports, LLC**
Acquisition of over 50 offsite Airport Parking Lots
- **Munters Corporation**
Acquisition of Aerotech, Inc.
- **Macquarie North American Infrastructure Inc.**
Acquisition of the Detroit-Canada Tunnel Corporation
- **Federal-Mogul Corporation**
Sale of its Camshaft, Lighting and Precision Forged Product Divisions

May 14, 2007

CRAIN'S DETROIT BUSINESS

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OTHER VOICES: Partnerships can shrink budget gaps

A key element in Mayor Kwame Kilpatrick's balanced budget presentation to the Detroit City Council last month was the proposed \$75 million deal with Windsor regarding a 75-year joint operations and use agreement of the Detroit-Windsor Tunnel. Although the details have not yet been provided, it is likely that a significant portion of the funding for such a deal will come from the private sector.

It appears that Detroit is now joining the ranks of many other governmental units turning to public-private partnerships as a vehicle to bridge the ever-growing budget-deficit gap.

Long used as a vehicle to efficiently modernize existing infrastructure in Western Europe and Australia, public-private partnerships have grown in popularity both globally and in the United States. Two prominent examples are the Chicago Skyway and the Indiana Toll Road, both of which use a concession model partnership.



Aleksandra Miziolek

Under the concession model, the private investor would enter into a long-term concession agreement with the state or other public entity in return for either a significant cash payment up front or a recurring stream of payments or a combination of both. The private investor would be responsible for the construction (if new), operation and maintenance of the project while the state would maintain control over areas of public interest such as quality standards, safety issues, future price increases, labor agreements and such.

While not without controversy, public-private partnerships have become the "poster child" for transportation project funding with the recent issuance by the U.S. Department of Transportation of model legislation for use by states.

Transportation projects are not the only potential beneficiaries. This financing can be used in connection with a number of other public assets. For instance, Illinois has started the public bid process for a proposed 75-year lease of the Illinois lottery to a private entity for an estimated price of at least \$10 billion.

In addition to the budget fix proposed by Kilpatrick, Gov. Jennifer

Granholm has embraced the concept in connection with her goal of leveraging public-private partnerships in alternative-energy development. MDOT, the Southeast Michigan Council of Governments and other public bodies in Michigan are closely monitoring the experience of other states. We also have had some legislative activity with the introduction of Senate Bill No. 59 which calls for the appointment of an Alternative Transportation Funding Task Force to evaluate alternative transportation funding strategies and opportunities.

The time is now to capitalize on this momentum. One way would

be to follow New York's lead and hold a symposium focusing on the issue. "Partnerships for Michigan" could be a forum for bringing together stakeholders, including legislators, staff, labor leaders, contractors, engineering firms and financing sources for developing innovative financing techniques and strategies for capitalizing on the unrealized assets of the public sector and the financial resources of the private sector. We can't afford to wait any longer.

Aleksandra Miziolek is co-leader of the infrastructure and project finance team of Dykema Gossett P.L.L.C.

LETTERS CONTINUED

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itics. We can't afford to be divided over how to fix state government funding.

The current budget debate needs to be reframed. The average Michigan resident does not interact with the state regularly, so most of us don't really understand where our state taxes go and what state employees do every day. But our taxes pay for things like state parks, clean air and water, prisons, state police, roads, schools, revenue sharing and so forth.

We must have a better appreciation for and understanding of our current services and what we require to be a healthy and competitive state. Low taxes won't do it alone.

Many don't realize that plenty of local governments in Michigan are also on the financial ropes, caused by huge cuts in state revenue sharing, limits on local governments' ability to generate revenues, and substantial increases in costs over inflation for medical, health care, and retiree benefits. Residents will only begin to wake up when their local services are cut.

If you don't mind visiting your children or grandchildren in Chicago, Washington, New York, Boston, Columbus, Seattle or any other place with an expanding economy, stay uninformed about the real crisis in Lansing. Today, companies go where the educated and creative workers are, not the lowest-tax state.

Decisions in Lansing need to be made about what is best for all of the state's residents over the longer term, not what is best for one political party. Our competitors in the U.S. and abroad aren't fighting amongst themselves, they're kicking our butts.

Arthur Mullen
Executive Director

Mount Clemens Downtown Development Authority

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HOTs, TOTs, and PPPs—new acronyms to keep an eye on

By Aleksandra Miziolek and Jeffrey Dalebrook

In a world of acronyms, HOT, TOT and PPP may still be under the radar screen, but not for long. With the huge budget deficits facing our states and municipalities, an increasing number of governmental entities have been turning to Public Private Partnerships (PPPs) as a solution.

PPPs (or P3s), while a relatively new concept in the United States, have been widely used by our global neighbors as an important financing vehicle for years. With the UK leading the charge, Western Europe, Australia, the Middle East, Africa and most recently, India, Latin America and the Caribbean have all taken advantage of the PPP as a vehicle to efficiently modernize existing infrastructure.

As is the case globally, the transportation sector has generated the greatest level of US PPP activity thus far. The Potomac Parkway in Virginia, the Chicago Skyway and the Indiana

Toll Road projects have certainly been the most visible examples. However, they are just the tip of the iceberg. Specific legislation authorizing public-private partnerships has been adopted in almost half of the states and in January of 2007, the US Department of Transportation (DOT) issued model PPP legislation as part of DOT's initiative to reduce congestion in the US transportation system.

As noted by U.S. Transportation Secretary Mary Peters, a long time proponent of PPPs, "The growing stranglehold that congestion is placing on America's transportation network calls for new ways of financing and maintaining our critical transportation infrastructure... This model legislation will help to ensure that states are in a position to tap into the billions of dollars that the private sector and lenders have amassed to invest in transportation."

The recent success of transportation PPPs in Virginia, Illinois and Indiana has significantly raised the visibility of this

innovative financing technique. State legislatures and departments of transportation are being deluged with proposals and advice on how to take advantage of PPPs. While once the province of Australia's Macquarie Infrastructure Group, Spain's Cintra and others, most of the leading US investment banking firms have formed PPP/ Infrastructure groups and are actively pursuing PPP projects with states and municipalities in transportation and a variety of other sectors. Commentators are urging states to consider P3s as an effective way to raise private capital and improve the quality of public transportation infrastructure and services.

As a steady stream of revenue is a necessary ingredient for infrastructure PPP projects, it is not surprising that toll generating assets have been the primary source of the recent U.S. PPP transportation activity. This trend will certainly continue, since over half of the states currently engage in some form of tolling.

(See BUDGET SOLUTIONS, Page Two)

BUDGET SOLUTIONS: HOTs, TOTs, PPPs are new acronyms to look out for

(Continued from page 1)

Other significant PPP projects in the works include the Northwest Parkway in Colorado and the New Jersey Turnpike. Whether states can continue to raise the staggering amounts that Chicago (\$1.8 billion) and Indiana (\$3.8 billion) have raised remains to be seen. There is no doubt, however, that there are many eager players interested in joining the U.S. PPP bandwagon and billions of dollars available for investment in transportation infrastructure projects.

Recognizing the benefits of a toll asset, several states are also actively pursuing the implementation of a toll road system.

For example, the Texas Department of Transportation (Texas DOT) has introduced toll roads into its statewide, multimodal Trans-Texas Corridor. Through the use of comprehensive development agreements (CDAs), the Texas DOT has transferred a significant portion of the development, construction and operating risk associated with certain of its road projects to the private sector while at the same time maintaining oversight and planning control over such projects.

Traditional toll road facilities, whether existing or greenfield projects, are not the only source of U.S. PPP transportation activity. We are also seeing an increase in the construction of or conversion to High Occupancy Toll (HOT) lanes or Truck Only Toll (TOT) lanes.

The SR 167 HOT Lanes Pilot Project implemented by the Washington State Department of Transportation (WSDOT) is representative of this trend. Noting the successful operation of HOT lanes in California, Texas, Minnesota and Colorado, the state of Washington has announced the opening of its first HOT lanes project in 2008.

This four year pilot project would convert nine miles of High-Occupancy Vehicle (HOV) lanes into HOT lanes that would be open to carpools, vanpools and transit and toll-paying solo drivers.

No toll booths will be required as the tolls will be debited from the driver's prepaid account electronically (i.e., e-tolling). In rolling out this project, the WSDOT noted that HOT lanes can provide on-going congestion-free travel for HOVs and a reliable choice for solo drivers while generating toll revenue to support roadway improvement costs.

But the world of PPPs is not limited to skyways and toll roads. States and municipalities have an abundance of assets that can serve as a source of capital. Electric and gas distribution systems have been the subject of recent transactions.

Most recently, the state lottery has been the asset du jour. Illinois and Indiana are actively considering the sale or lease of their lotteries. With investment bankers aggressively pitching these projects as a panacea for all budget woes, it is not surprising that rumblings of lottery PPPs or outright privatizations have been heard throughout a number of other states, including Michigan which operates one of the most profitable lotteries in the country. Whether a PPP is focused on a traditional transportation asset such as a toll road, a newer HOT or TOT lane concept, distribution assets or a lottery, it is clear that this acronym is one whose time has come.

Aleksandra Miziolek is a member of Dykema's Corporate Finance group and has experience in mergers and acquisitions of public and privately held companies.

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